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No. 99-1786

IN THE
SUPREME COURT OF THE UNITED STATES

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, et al.,
Petitioners,

v.

JANETTE AND ERIC KNUDSON,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

AARP and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the position of neither party in the case of *Great-West Life & Annuity Insurance Company v. Knudson*, which is before the Court on a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Pursuant to Supreme Court Rule 37.3, consent of the parties to the filing of the brief was sought, in writing, through counsel. Counsel for the petitioner withheld consent, stating in a telephone conversation, that counsel believed that *amici*'s position would be confusing to the Court. Counsel for respondents did not respond.

INTEREST OF AMICI CURIAE

AARP is a nonprofit membership organization of more than 34 million persons age 50 or older dedicated to addressing the needs and interests of older Americans. More than 45% of AARP's members are working, and many receive employer-funded health, pension, disability, and other employee benefits. Through education, advocacy and service, and by promoting independence, dignity and purpose, AARP seeks to enhance the quality of life for all citizens. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of public and private pensions, health, disability, and other employee benefits.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of

lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

As part of their advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP and NELA have participated as *amici curiae*, both jointly and singly, in cases involving ERISA § 502(a)(3) before this Court, *see, e.g.*, *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) (suits by nonfiduciary parties in interest permitted under § 502(a)(3)); *Pegram v. Herdrich*, 530 U.S. 211 (2000) (physician-owned HMOs may not be sued as fiduciaries under § 502(a)(3)); *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (suits by individual participants permitted under § 502(a)(3)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (remedies under § 502(a)(3)), as well as numerous other ERISA cases, including *Egelhoff v. Egelhoff*, 121 S. Ct. 1322 (2001); *Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997); and *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997).

AARP's members, NELA members' clients, and other participants and beneficiaries in private, employer-sponsored employee benefit plans rely on the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, to protect their rights under those plans. ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers and retirees, since the quality of their lives depends heavily upon the security and amount of their employee benefits. *Amici* therefore have a strong and determined interest in the outcome of this case and in ensuring, to the extent possible, that the rights guaranteed by ERISA are fully carried out.

REASONS FOR GRANTING THE MOTION

Once again, the Court is being called upon to address issues arising under ERISA's civil enforcement provisions. ERISA § 502(a), 29 U.S.C. § 1132(a). *See, e.g.*, *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Pegram v. Herdrich*, 530 U.S. 211 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). Although the number of decisions concerning ERISA's civil enforcement provisions pales in comparison with the number of preemption decisions,[1] the scope of these civil enforcement provisions has generated a substantial number of decisions in the courts.

Although the precise legal question presented here is whether a plan states a claim for relief under ERISA § 502(a)(3) to enforce a reimbursement provision in the plan against a participant, the underlying issue is what remedies fall within the term "appropriate equitable relief."[2] Since this Court's decision in *Mertens*, the lower courts have been in a quandary over the scope of remedies falling within the term "appropriate equitable relief."

Some decisions have left participants and beneficiaries with limited or no remedies, even though the relief sought could have been construed as restitution, a constructive trust or unjust enrichment. *See, e.g.*, *Farr v. U.S. West Communications, Inc.*,

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[1] This Court alone has decided over twenty preemption cases including this term's case of *Egelhoff v. Egelhoff*, 121 S. Ct. 1322 (2001).

[2] ERISA § 502(a)(3) authorizes a civil action :

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 935 (2000); *Kerr v. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999); *Bast v. Prudential Ins. Co.*, 150 F.3d 1003 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 170 (1999); *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376 (9th Cir. 1996); *Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722, 725 (6th Cir. 1995); *Buckley Dement v. Travelers Plan Administrators of Illinois*, 39 F.3d 784 (7th Cir. 1994); *Novak v. Andersen Corp.*, 962 F.2d 757, 760-61 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).

In contrast, even where circuit courts have granted relief, they have struggled to stay within the analytical framework *Mertens* has established. These courts disagree over the parameters of equitable relief and the characterization of plaintiffs' request for relief. *Compare, e.g., Holmes v. Bethlehem Steel Corp. Pension Plan*, 213 F.3d 124, 131 (3d Cir. 2000) (payment of prejudgement interest was an equitable remedy to remedy a plan's unjust enrichment and use of the participant's money); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999) (monetary relief is available as equitable make-whole relief when it is sought as remedy for a breach of fiduciary duty); *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999) (a fair reading of totality of complaint indicates equitable relief of specific performance and enforcement of contract is being sought); *Health Cost Controls of Illinois v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999) (in *dicta*, stating that restitution is always equitable when it is sought as remedy for a breach of fiduciary duty); *Fotta v. Trustees of the UMW*, 165 F.3d 209, 212-13 (3d Cir. 1998) (same as *Holmes, supra*); *In re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255, 1269 (3d Cir. 1995) (restitutionary reimbursement for back benefits is equitable relief); *Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995) (permitting a suit for reimbursement to proceed, without deciding, which theory, unjust enrichment or restitution to enforce contractual provision, was applicable); *Schwartz v. Gregoire*, 45 F.3d 1017, 1022 (6th Cir. 1995) (back pay is restitutionary because it restores individuals to the position they would have been in; front pay is a substitute for reinstatement, which is always equitable, recognizing that without such a holding, there would

be no remedy for a § 510 violation for retaliatory discharge); *Health Cost Controls v. Skinner*, 44 F.3d 535, 537 (7th Cir. 1995) (reimbursement suit against participant for medical costs recovered against tortfeasor may proceed, recharacterizing requested relief from damages to restitution).

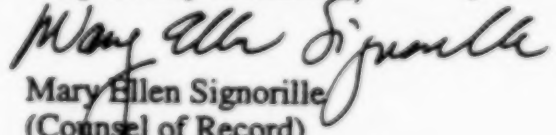
Amici believe that the arguments that they are presenting to the Court are different than those being presented by either party or *amici* represented by Mr. Taranto, thus assisting the Court in its consideration of this case.

Thus, this case presents the Court with the opportunity to revisit its *Mertens* decision, or alternatively, provide guidance on the scope of the term "appropriate equitable relief."

The resolution of this issue is important to AARP members and NELA's members' clients because these individuals need to know their legal obligations if they are sued under ERISA § 502(a)(3), or, conversely, their legal remedies if they themselves sue under that section. Thus, the decision in this case will have a direct and vital bearing on the economic security of older working Americans. In light of the significance of the issues presented by this case, *amici curiae* respectfully submit this motion seeking leave to file the accompanying brief.

May 3, 2001

Respectfully submitted,



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BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

INTERESTS OF *AMICI CURIAE*[y]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief

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[y] No counsel for any party authored any portion of this brief. No party other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Mertens v. Hewitt Associates, 508 U.S. 248 (1993), should be overruled. Not only is the jurisprudence in determining the parameters of the term "appropriate equitable relief" inconsistent between circuits, but, more importantly, the underlying analyses are also in conflict. What these decisions illustrate is that the analysis set forth in *Mertens* is neither workable nor analytically sound. The difference between make-whole relief, which *Mertens* held was not equitable relief, and restitution and other traditional equitable relief, which *Mertens* endorsed, is not a bright-line test. In fact, those circuit courts which have granted relief are doing what courts of equity did -- award make-whole relief. Quite simply, make-whole relief should be the meaning of "appropriate equitable relief." *Id.* at 266.

Moreover, *Mertens*' view of ERISA is seemingly at odds with the view of ERISA espoused in more recent Supreme Court precedent. *Mertens* minimized ERISA's grounding in trust law while last term's decision in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000), embraced it. *Mertens'* view of ERISA is also in tension with the view endorsed in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). In *Varity*, the Court found that Congress determined that ERISA was to provide more protection than trust law, not less. *Id.* at 497. Contrary to the *Varity* Court's finding of congressional intent, *Mertens* interprets ERISA to provide less protection to participants.

Finally, should this Court decide not to overrule *Mertens*, but instead to decide this case more narrowly on the parameters of equitable relief, it is imperative that this Court send a message to the circuit courts that "what is good for the goose is good for the gander." The Court's rationale should apply not just to reimbursement cases, but also to other requests for restitutionary relief.

ARGUMENT

I. *MERTENS v. HEWITT ASSOCIATES* SHOULD BE OVERRULED BECAUSE ITS INTERPRETATION OF "APPROPRIATE EQUITABLE RELIEF" HAS BEEN HONORED IN THE BREACH.

Mertens v. Hewitt Associates, *supra*, is the seminal case interpreting the term "appropriate equitable relief" under ERISA § 502(a)(3). The precise question before the Court was "whether a nonfiduciary who knowingly participates in the breach of fiduciary duty imposed by [ERISA] is liable for losses that an employee benefit plan suffers as a result of the breach." *Id.* at 249. In *Mertens*, the Court's analysis focused on the remedies available, specifically what relief the phrase "appropriate equitable relief" embraced. *Id.* at 255. The Court concluded that "appropriate equitable relief" under § 502(a)(3) did not encompass compensatory or money damages because "[m]oney damages are, of course, the classic form of legal relief." *Id.* Instead, the Court expressly stated that equitable relief for a nonfiduciary's knowing participation in a fiduciary breach referred to "categories of relief that were typically available in equity such as injunction, mandamus, and restitution, but not compensatory damages." *Id.* at 256.

A. The Circuit Courts Have Struggled to Reconcile *Mertens* With the Award of Traditional Equitable Remedies.

Although *Mertens* held that "appropriate equitable relief" under § 502(a)(3) did not include compensatory or money damages, the Court provided little guidance concerning the scope of the term "appropriate equitable relief," and in particular, what constitutes restitutionary relief. The circuit courts have struggled to give some meaning to the term "appropriate equitable relief." Most circuit courts realized that an extremely narrow reading of the *Mertens* decision would leave plaintiffs with no or limited remedies, and thus gut any

protections provided by § 502(a)(3).[4] *Id.* at 274. And so, many of the circuit courts have taken various steps to prevent this result, and thus to attempt to reconcile *Mertens* with the purposes of courts of equity.

In order to award a remedy where equity would seem to call for one, some circuit courts have simply recharacterized plaintiff's request for relief so that it meets the *Mertens* standard of traditional equitable relief. *See, e.g., Health Cost Controls of Illinois v. Washington*, 187 F.3d at 710 (recharacterizing suit for restitution, which may be either legal or equitable, as one for constructive trust on money in escrow account). Other courts have drawn distinctions between the fiduciary and nonfiduciary status of the defendant, holding that suit against a fiduciary, unlike a nonfiduciary, permits make-whole relief since courts of equity awarded such relief. *See Strom v. Goldman, Sachs & Co., supra*; *Health Cost Controls of Illinois v. Washington, supra*; *but see McLeod v. Oregon Lithoprint, Inc., supra* (monetary damages are not available, regardless of the defendant's fiduciary or nonfiduciary status). In circuits permitting subrogation claims against participants, they have awarded an offset of the attorneys' fees paid by the participant, acknowledging that in equity the court would have allowed such an offset because the recovering party, that is the plan, would not have collected this money without the efforts of the plaintiff, that is the participant. *See*

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[4] *See generally* E. Lopez, *Equitable Remedies for Breach of Fiduciary Duty Under ERISA After Varity Corp. v. Howe*, 18 BERKELEY J. EMPLOYMENT & LAB. L. 323 (1997); R. Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. R. 631 (Winter 1994) (arguing that narrow interpretations of 502(a) have undermined ERISA's primary goals); E. Darroch, *Mertens v. Hewitt Associates: The Supreme Court's Dismantling of Civil Enforcement Under ERISA*, 1994 DET. C.L. REV. 1089 (Fall 1994).

Wal-Mart Stores, Inc. v. Wells, 213 F.3d 398, 402 (7th Cir. 2000).[5]

What these cases illustrate is that the distinction in *Mertens* between make-whole relief and traditional equitable relief is not workable in today's world. And, the distinction of where the remedy originated becomes less important given that the purpose of courts of equity was to award make-whole relief, and they had done so for hundreds of years. As the Seventh Circuit sagely intoned: "there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp. . . . We do not think the motto of our law should be "let the dead bury the living." *Health Cost Controls of Illinois v. Washington*, 187 F.3d at 711.

Significantly, there is still a crucial difference between legal and equitable relief. Unlike legal relief, appropriate equitable relief will never include any compensatory and extra-contractual damages such as punitive damages, awards for emotional or mental distress and loss of reputation. D. Dobbs, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 12.5 (2d ed. 1993). *Accord, Mertens v. Hewitt Associates*, 508 U.S. 248, 270-71 (1993) (dissenting opinion); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145-48 (1985) (extra contractual damages are not available under § 409).[6]

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[5] In *Wal-Mart Stores, Inc. v. Wells*, 213 F.3d 398, 400 (7th Cir. 2000), the court questioned whether ERISA permits monetary relief to be awarded as an adjunct to other traditional equitable relief inasmuch as equity permits courts to award monetary relief under the "clean up" doctrine. The court did not need to reach this issue in its decision.

[6] Moreover, courts have discretion to determine what is "appropriate" in awarding equitable relief, depending on the circumstances of the case. *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (cause of action was appropriate where plaintiffs could not proceed under any other section of ERISA).

Quite simply, this Court should acknowledge and ratify that the circuit courts are interpreting "appropriate equitable relief" to mean make-whole relief and acting as courts of equity have always done for hundreds of years. *Mertens*, 508 U.S. at 263-64, 266.

B. *Mertens* Is in Tension with the View of ERISA Embraced by Subsequent Supreme Court Precedent.

There is now a tension between the *Mertens* decision and this Court's unanimous decision in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. at 250-51. *Mertens* rejected the argument that its narrow reading of equitable relief failed to acknowledge ERISA's roots in the common law of trusts. *Mertens*, 508 U.S. at 255-56. The majority refused to interpret "appropriate equitable relief" as whatever relief a court of equity was empowered to provide to remedy actions brought by beneficiaries for a breach of trust. In contrast, in *Harris Trust*, the Court held that the potential recission of the transaction, restitution of the purchase price, and disgorgement of profits fell within the remedies provided under the common law of trusts concerning a fiduciary's transfer of trust property to a third person. *Harris Trust*, 530 U.S. at 250. Thus, *Mertens* seemingly minimized ERISA's grounding in trust law while *Harris Trust* embraced it.[7]

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[7] This tension cannot be rationalized on the basis that the *Mertens* plaintiff was an individual participant while the *Harris Trust* plaintiff was a fiduciary. This should be a distinction without a difference because, of course, fiduciaries must represent the interests of the participants and beneficiaries. *See generally Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982) (in the context of attorney-client privilege, trustees of employee benefit plans are fiduciaries who owe undivided duty of loyalty to benefit plan participants); *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991) (attorneys for a plan trustee were required to turn over documents to plaintiff participant because attorneys' clients were plan's participants and beneficiaries, not plan fiduciary); ERISA § 404(a), 29 U.S.C. § 1104(a).

Indeed, *Mertens*' view of ERISA's purposes and scope is also at odds with the view of the Supreme Court in *Varity Corp. v. Howe*, 516 U.S. at 497. In *Varity*, the Court emphasized that trust law does not control completely under ERISA, but instead acts only as a guide as to the minimum protections ERISA provides. The Court recognized that Congress had determined "that the common law of trusts did not offer completely satisfactory protections." *Id.* Based on *Varity*, ERISA should be interpreted to provide greater protections to participants and beneficiaries than the law of trusts provided.

Thus, *Mertens* should be overruled as being inconsistent with *Harris Trust* and *Varity*.

II. THE NINTH CIRCUIT'S INTERPRETATION OF *MERTENS* AS PRECLUDING MONETARY RELIEF IN MOST CASES UNDER ERISA § 502(A)(3) IS JUST PLAIN WRONG.

Of all the circuits, the Ninth Circuit has taken the most restrictive view of what constitutes "appropriate equitable relief" under the standard articulated in *Mertens*. Indeed, the Ninth Circuit has been adamant that *Mertens* generally bans monetary relief, regardless of plaintiff's characterization of the relief.

Amici believes that the Ninth Circuit's reading of *Mertens* is too narrow. There is no doubt that "appropriate equitable relief" under § 502(a)(3) includes restitution.[8] *Mertens v. Hewitt Associates*, 508 U.S. at 260. And, there is no doubt that restitution may include monetary relief. *Harris Trust*, 530 U.S. at 250-51 (request for monetary relief in the form of restitution

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[8] It is of no matter whether restitution is accomplished through the imposition of a constructive trust, disgorgement, an accounting, subrogation, or an equitable lien. *See generally* RESTATEMENT OF RESTITUTION (Second) §§ 1, 160 &161; D. Dobbs, LAW OF REMEDIES § 4.1(1) at 225, 240 (2d ed. 1993). The result is still the same.

is "appropriate equitable relief"). Indeed, more often than not, restitution is monetary relief that acts as a substitute for the specific item gained by the defendant. D. Dobbs, LAW OF REMEDIES § 4.1(1) at 259 (2d ed. 1993).

Moreover, contrary to the implication of the Ninth Circuit's line of cases, restitution does not require wrongdoing. *See* D. Dobbs, LAW OF REMEDIES at 224; RESTATEMENT OF RESTITUTION (Second) § Part 1, Chapter 7. Significantly, the Ninth Circuit has only recognized restitutionary relief as appropriate equitable relief where the defendant has been unjustly enriched or there is proof of fraud or other wrongdoing, and plan assets have been taken. *Compare Bast v. Prudential Ins. Co.*, 150 F.3d 1003 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 170 (1999), *with Waller v. Blue Cross*, 32 F.3d 1337 (9th Cir. 1994) (imposition of constructive trust upon employers' ill-gotten profits from their breach of fiduciary duties); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988).

An excellent example of the Ninth Circuit's faulty reasoning is *Bast v. Prudential Ins. Co., supra*. In *Bast*, the Ninth Circuit was faced with an allegation of a breach of fiduciary duty for failure to timely provide the decedent with the benefits to which she was entitled. The court concluded that to grant restitution in the amount that the plan saved by not providing the benefits was equivalent to money damages. *Id.* at 1010. The court also rejected the argument that an appropriate equitable remedy would be a constructive trust in the amount that the plan saved by not providing the benefits because although "Prudential Insurance Company] may have been unjustly enriched, it did not take money from the plan." *Id.* at 1011. *Compare with Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487 (D.C. Cir. 1998) (restitution of erroneously paid benefits is appropriate equitable relief where party has been unjustly enriched). The principles of unjust enrichment do not require the actual taking of plan assets; instead it is the reasonable expectations of the parties that should govern. *See generally id.* at 495; RESTATEMENT OF RESTITUTION (Second) § 1.

Moreover, the Ninth Circuit has not recognized that the principle of unjust enrichment, without more, does not always adequately address attempts to readjust the economic situations between the parties, and that equitable principles permit the courts to fashion other types of remedies. D. Dobbs, LAW OF REMEDIES at 227. Indeed, equitable remedies are appropriate when legal remedies are inadequate. *Id.* at 257. And, restitution is always equitable when it is sought as remedy for a breach of fiduciary duty. RESTATEMENT OF TRUSTS (Second) § 197 ("the remedies of the beneficiary against the trustee are exclusively equitable").

If this Court should decide that the Ninth Circuit's reading of equitable relief is too narrow in this case, and decides that it will not overrule *Mertens*, then it is imperative that the Court send a message to the Ninth Circuit and other courts that the rationale in this case applies generally to all types of cases where equitable relief is sought, not just in subrogation or contractual reimbursement cases. Otherwise the jurisprudence in this area of the law will remain as muddled as it has been.

CONCLUSION

For the foregoing reasons, AARP and NELA urge the Court to overrule *Mertens*, or alternatively, hold that restitution includes monetary relief in instances other than where "ill-gotten" assets or profits are taken from a plan through fraud, wrongdoing, duress, or other unconscionable behavior, and

reverse the decision of the Ninth Circuit, and remand for findings consistent with the Court's decision.

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Respectfully submitted,

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